

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXVIII, NO. 17

May 18, 2001

CRIMINAL LAW ISSUE

WALKER v. STATE, No. 46S03-0101-CR-39, ___ N.E.2d ___ (Ind. May 15, 2001).
SHEPARD, C. J.

During the 20th Century's major constitutional revisions concerning the courts, the people of Indiana conferred new responsibilities on the appellate courts to hear appeals on penalties and "review and revise the sentence imposed." Ind. Const. art VII, § 4. Appellant Kevin Walker seeks relief under this provision from his consecutive forty-year sentences for twice performing oral sex on a child. . . .

On appeal, Walker argued that his crime constituted a class A felony by virtue of the fact that he was over twenty-one years old, one of several facts that make the crime a class A felony (others include use of a deadly weapon and serious bodily injury). He argued that using age alone to create a class A penalty of eighty years (as opposed, say, to the maximum of forty years for two class B's) was manifestly unreasonable.

The Court of Appeals treated this as an assault on the statutory scheme and affirmed the eighty-year sentence, observing that fixing penalties is a legislative function, not a judicial one. [Citation omitted.] This is certainly correct, but not an adequate response to Walker's right to seek sentence review under Article VII, § 4.

. . . The judicial amendments to the Indiana Constitution drafted in the 1960s confer a distinct responsibility on the appellate courts: "the power to review all questions of law and to review and revise the sentence imposed." Ind. Const. art. VII, § 4. As Judge Najam of the Court of Appeals correctly observed, "This authority is found in the text of the

Constitution and is independent from our general appellate jurisdiction." [Citation omitted.]

Those who framed these provisions had in mind the sort of sentencing revision conducted by the Court of Criminal Appeals in England. Cooper v. State, 540 N.E.2d 1216, 1218 (Ind. 1989). The English statute establishing the Court of Criminal Appeals gave the power to review and revise sentences:

On appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal. [Citation omitted.]

Indiana appellate courts have exercised this responsibility over the last three decades with great restraint, recognizing the special expertise of the trial bench in making sentencing decisions. We have indicated by rule that a sentence will be modified only when it is “manifestly unreasonable,” Ind. Appellate Rule 17(B), a very tough standard to meet.

Still, persons have an appellate right to full consideration of claims. . . . Rule 17(B) currently reads, “The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.” This formulation still means that trial court decisions are to be affirmed on the great majority of occasions. . . .

Walker was convicted on two counts of child molestation for performing oral sex on a six-year-old boy. . . . The trial court found a number of aggravating circumstances, including committing the crime while on probation and fleeing the jurisdiction. Still, the trial court did not find a history of criminal behavior. Moreover, the two separate counts of child molestation were identical and involved the same child. Additionally, there was no physical injury. Although the absence of physical injury does not bar an enhanced sentence, this is some distance from being the worst offense or the most culpable offender. While the aggravating circumstances warranted an enhanced sentence, Walker’s aggregate sentence of eighty years is manifestly unreasonable.

. . . We therefore affirm the convictions and revise the sentences to run concurrently.

BOEHM, RUCKER, and SULLIVAN, JJ., concurred.

DICKSON, J., dissented without filing a separate written opinion.

CIVIL LAW ISSUES

RHEEM MFR. CO. v. PHELPS HEATING & AIR CONDITIONING, INC., No. 49S02-0003-CV-219, ___ N.E.2d ___ (Ind. May 9, 2001).

SULLIVAN, J.

Phelps expended considerable sums repairing Rheem furnaces that Phelps had sold and installed. We hold that the language of the UCC precludes Phelps from recovering consequential damages from Rheem for breach of express warranty and that the language of the express warranty at issue precludes Phelps from recovering for labor expenses. However, Phelps may still have valid claims for indemnity and breach of implied warranty.

....

Phelps brought suit against Rheem and Federated on August 8, 1994, claiming that

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Rheem breached its express and implied warranties and was negligent in its manufacture of the furnaces. Underlying all of these claims is Phelps’s assertion that the furnaces “shut down and were not operational after installation. . . . The complaint first contended that Rheem breached the implied warranty of fitness for a particular purpose because Rheem and Federated “knew that Phelps intended to use the furnaces and install them in properties serviced by Phelps” [citation to Record omitted] but the furnaces were “defective, and after they had been installed . . . they failed to function properly.” [Citation to Record omitted.] Similarly, Phelps sought damages for breach of the implied warranty of merchantability, contending that Rheem and Federated were merchants but that the defects in the furnaces made them “unsuitable and posed a risk of personal injury and property damages to customers serviced by Phelps” [Citation to Record omitted.] Phelps also

asserted a claim under the express warranty, arguing that it “incurred substantial expenses and other damages in remedying the problems caused by the defective furnaces.” [Citation to Record omitted.]. . . .

Phelps described its damages as including “but not limited to, lost customers, lost profits, and the additional cost of servicing the defective furnaces and remedying the defects therein.” [Citation to Record omitted.] . . .

Rheem moved for summary judgment on all of these claims. Rheem’s brief in support of its motion asserted that the damages Phelps sought on the warranty theories were precluded by the limitations in the express warranty and by lack of privity on the implied warranties. . . . The trial court granted Rheem’s motion for summary judgment in regards to negligence, but denied it as to the warranties.

. . . The Court of Appeals affirmed the denial of summary judgment. Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc., 714 N.E.2d 1218 (Ind. Ct. App. 1999). As for the express warranties, the Court of Appeals found a genuine issue of material fact as to “whether the cumulative effect of Rheem’s actions was commercially reasonable.” [Citation omitted.] On the implied warranty claims, the court stated that the evidence establishing privity was “slight.” The court nevertheless held that “perfect vertical privity is not necessary in this case” and then found a genuine issue of material fact as to whether Rheem breached its implied warranties and whether its conduct in doing so was “reasonable.” [Citation omitted.]

. . . .
Rheem first argues that the trial court should have granted summary judgment as to Phelps’s claim for lost profits under the express warranty because the warranty excluded consequential damages. [Footnote omitted.] This argument requires us to examine the interplay between Indiana Code §§ 26-1-2-719(2) and (3), the UCC subsections pertinent to damage exclusions and remedy limitations in express warranties:

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in IC 26-1.
(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damages where the loss is commercial is not. [Footnote omitted.]

. . . .
These arguments pose the question of whether an exclusion of consequential damages survives when a separate contract provision limiting a buyer’s remedies has failed of its essential purpose. The courts that have faced this issue have fallen into two camps that are divided along the lines of the parties’ arguments in this case. One group

takes what is known as the “dependent” view¹⁵⁴ and reads § 2-719(2)’s reference to remedies “provided in [the UCC]” as overriding a contract’s consequential damage exclusion. [Citations omitted.] Other courts take an “independent” view and reason that because §§ 2-719(2) and (3) are separate subsections with separate language and separate standards, the failure of a limited remedy has no effect on an exclusion of consequential damages. [Citation omitted.]

The Court of Appeals accepted the independent view. However, the court also grafted onto § 2-719 a requirement of “commercial reasonableness” and affirmed the denial of summary judgment on the ground that a triable issue existed as to whether Rheem’s consequential damages exclusion and limited remedy were commercially reasonable.

We hold that Indiana Code § 26-1-2-719(2) does not categorically invalidate an exclusion of consequential damages when a limited remedy fails of its essential purpose. [Citation omitted.] . . .

. . . .
In light of our conclusion that the legislature intended the independent view to apply to these circumstances, [footnote omitted] we are constrained to reject the commercial reasonableness test applied by the Court of Appeals and to reverse the trial court's denial of summary judgment on Phelps's claims for incidental and consequential damages. [Footnote omitted.]


. . . .
SHEPARD, C. J., and BOEHM, J., concurred.


RUCKER, J., did not participate.

DICKSON, J., filed a separate written opinion in which he dissented, in part, as follows:

I am persuaded that Indiana Code § 26-1-2-719(2) should be construed to invalidate an exclusion of consequential damages when a limitation of remedy fails of its essential purpose.

. . . .
HARLETT v. ST. VINCENT HOSP. & HEALTH SERV., No. 49A04-0009-CV-407, ___ N.E.2d (Ind. Ct. App. May 14, 2001).

 LIFF, Senior Judge

The Harletts filed their proposed complaint with the Indiana Department of Insurance, alleging that St. Vincent nurses were negligent in failing to protect Harlett from developing a bedsore (decubitus ulcer) and for failing to treat the bedsore once it became apparent. By agreement, the parties selected  panel chair and began selecting panelists. . . . The parties struck from the striking panels according to Ind. Code § 34-18-10-10, resulting in the selection of one nurse and one physician as panel members.

The selected panelists twice selected a physician as the third panelist, but the Harletts objected. The chairman then listed a striking panel of nurses, and the parties alternatively struck, leaving one panelist. The chairman then certified the panel to the Indiana Department of Insurance as consisting of two nurses and one physician.

. . . St. Vincent requested that the chairman excuse the two nurses and replace them with physicians. The chairman declined to do so. . . . St. Vincent filed its motion for a preliminary determination of law, requesting that the trial court order that the medical review panel be comprised of at least two physicians and that any nurse panelist be limited in the opinions that she might render. St. Vincent cited *Long v. Methodist Hospital of Indiana,*

Inc., 699 N.E.2d 1164 (Ind. Ct. App. 1998), ¹⁵⁰*trans. denied*, for the proposition that the nurse panelist was unqualified to determine an issue of causation.

. . . .
. . . [In *Long*,] Methodist filed a motion for summary judgment based upon the opinion of the medical review panel, and the plaintiff responded by submitting the affidavit of a registered nurse. The affidavit stated that the nursing care of Methodist fell below the applicable standard of care when Methodist's nursing staff failed to follow the physician's orders. The trial court subsequently granted Methodist's motion to strike the affidavit, and the plaintiff appealed. [Citation omitted.]

This court held that the trial court was correct in granting the motion to strike. Specifically, we held that nurses are not qualified to offer expert testimony as to the medical

cause of injuries or as to increased risk of harm. [Citation omitted.] We expressed no opinion as to a nurse's qualification to serve on a medical review panel.

The Medical Malpractice Act states that "all health care providers in Indiana . . . who hold a license to practice in their profession shall be available for selection as members of the medical review panel." Ind. Code § 34-18-10-5. . . . The panel's written opinion is admissible as non-conclusive evidence in any action subsequently brought by the claimant in a court of law, and any member of the panel may be called to appear and testify. Ind. Code § 34-18-10-23.

As the Harletts point out in their appellate briefs, the Act includes "registered or licensed practical nurse[s]" in its definition of the term "health care provider." Ind. Code § 34-18-2-14. Thus, the Medical Malpractice Act provides that nurses, as health care providers, are qualified to serve on a medical review panel. In light of this statutory authorization, we hold that the trial court erred in expanding the specific holding of *Long* to exclude the nurse from the medical review panel.

In so holding, we recognize that *Long* has implications with regard a nurse's qualification to testify as an expert witness on certain matters. Accordingly, the case has some application to a nurse's ability to testify pursuant to Ind. Code § 34-18-10-23. . . .

....
BAKER, and KIRSCH, JJ., concurred.

ERRATUM: Please change the date of Volume XXVII Issue 16 from April 16, 2001 to May 11, 2001

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May 18, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by

reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
<i>Owens Corning Fiberglass v. Cobb</i>	714 N.E.2d 295 49A04-9801-CV-46	Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos	01-19-00	
<i>Krise v. State</i>	718 N.E.2d 1136 16A05-9809-CR-460	(1) officers' entry into home to serve body attachment not illegal; (2) roommate gave voluntary consent to search; (3) scope of consent extended to defendant's purse located in common bathroom	2-17-00	5-09-01. Male roommate had no actual or apparent authority to consent to search of defendant's purse.
<i>Rheem Mfg. v. Phelps Htg. & Air Cond.</i>	714 N.E.2d 1218, 49A02-9807-CV-620	1) failure of essential purpose of contract's limited remedy does not, without more, invalidate a wholly distinct term excluding consequential damages; (2) genuine issues of material fact as to whether the cumulative effect of manufacturer's actions was commercially reasonable precluded summary judgment as to validity of consequential damages exclusion; and (3) genuine issues of material fact as to whether distributor acted as manufacturer's agent precluded summary judgment as to warranty claims	3-23-00	5-09-01. UCC 26-1-2-719 does not categorically invalidate an exclusion of consequential damages when a limited remedy fails of its essential purpose. Rejects Court of Appeals "commercial reasonableness" requirement for valid exclusions.
<i>Lockett v. State</i>	720 N.E.2d 762 02A03-9905-CR-184	Officer's question whether motorist had any weapons in the car or on his person impermissibly expanded a legitimate traffic stop	3-29-00	
<i>Fratus v. Marion Community School Board</i>	721 N.E.2d 280 27A02-9901-CV-12	(1) Indiana Education Employment Relations Board (IEERB) did not have jurisdiction over teachers' claim against union for breach of its duty of fair representation, and (2) IEERB did not have jurisdiction over teachers' tort and breach of contract claims against school board	5-04-00	
<i>McCarthy v. State</i>	726 N.E.2d 789 37A04-9903-CR-108	Reversible error in teacher's sexual misconduct prosecution to prevent his cross-examination of child's mother about her filing notice of tort claim against school and possible intent to sue defendant personally.	6-08-00	
<i>Zimmerman v. State</i>	727 N.E.2d 714 77A01-9909-CV-318	Cases hold no appeal lies from a prison disciplinary action, but here inmate could bring a civil mandate action to compel DOC to comply with a clear statutory mandate.	8-15-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
<i>Felsher v. City of Evansville</i>	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-00	
<i>Dow Chemical v. Ebling</i>	723 N.E.2d 881 22A05-9812-CV-625	State law claims against pesticide manufacturer, with exception of negligent design, were preempted by federal FIFRA pesticide control act; pest control company provided a service and owed duty of care to apartment dwellers, precluding summary judgment.	8-15-00	
<i>Sanchez v. State</i>	732 N.E.2d 165 92A03-9908-CR-322	Instruction that jury could not consider voluntary intoxication evidence did not violate Indiana Constitution	9-05-00	
<i>South Gibson School Board v. Sollman</i>	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
<i>Poynter v. State</i>	733 N.E.2d 500 57A03-9911-CR-423	At both pretrials Court advised nonindigent defendant he needed counsel for trial and defendant indicated he knew he had to retain lawyer but was working and had been tired; 2 nd pretrial was continued to give more time to retain counsel; trial proceeded when defendant appeared without counsel; record had no clear advice of waiver or dangers of going pro se - conviction reversed.	10-19-00	
<i>Moberly v. Day</i>	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault has abrogated fellow servant doctrine.	10-24-00	
<i>Shambaugh and Koorsen v. Carlisle</i>	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.		

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
<i>S.T. v. State</i>	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state=s failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state=s motion	10-24-00	
<i>Tapia v. State</i>	734 N.E.2d 307 45A03-9908-PC-304	Reverses refusal to allow PCR amendment sought 2 weeks prior to hearing or to allow withdrawal of petition without prejudice	11-17-00	
<i>Tincher v. Davidson</i>	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury=s failures to make comparative fault damage calculations correctly	11-22-00	
<i>Brown v. Branch</i>	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
<i>New Castle Lodge v. St. Board of Tx. Comm.</i>	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
<i>Gallant Ins. Co. v. Isaac</i>	732 N.E.2d 1262 49A02-0001-CV-56	Insurer >s agent had Ainherent authority@ to bind insurer, applying case holding corp. president had inherent authority to bind corp. to contract	11-22-00	
<i>Reeder v. State</i>	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert=s affidavit sufficed to avoid summary judgment but affiant=s death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
<i>Holley v. Childress</i>	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption noncustodial parent was fit so that temporary guardianship for deceased custodial parent=s new spouse was error.	1-11-01	
<i>Cannon v. Cannon</i>	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	
<i>City of New Haven v. Reichhart and Chemical Waste Mgmt. of IN</i>	729 N.E.2d 600 99A02-9904-CV-247	Challenge to annexation financed by defendant=s employer was exercise of First Amendment petition right and 12(B)(6) dismissal of city=s malicious prosecution claim was properly granted.	1-11-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
<i>Davidson v. State</i>	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of Asame or similar character@ when failure to do so resulted in court=s having discretion to order consecutive sentences.	1-17-01	
<i>Griffin v. State</i>	735 N.E.2d 258 49A02-9909-CR-647	Three opinion resolution on admissibility under Ev. Rule 606 of juror affidavits on participation of alternate in deliberations - op. 1 affidavits inadmissible; op 2 affidavits admissible but no prejudice shown, op 3 affidavits admissible and prejudice	1-17-01	
<i>Leshore v. State</i>	739 N.E.2d 1075 02A03-0007-CR-234	(1) Writ of body attachment on which police detained defendant was invalid on its face for failure to include bail or escrow amount, and (2) defendant's flight from detention under the writ did not amount to escape.	1-29-01	
<i>Rogers v. R.J. Reynolds Tobacco</i>	731 N.E.2d 6 49A02-9808-CV-668	(1) trial court committed reversible error by making ex parte communication with deliberating jury, in which jury was advised that it could hold a press conference after its verdict was read, without giving notice to parties; (2) denial of plaintiff's motion for relief from judgment, which was based on public statements by director of one of manufacturers, was within court's discretion; (3) jury was properly instructed on doctrine of incurred risk; (4) evidentiary rulings were within court's discretion; and (5) leave to amend complaint was properly denied	2-09-01	
<i>Mercantile Nat=l Bank v. First Builders</i>	732 N.E.2d 1287 45A03-9904-CV-132	materialman=s notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic=s lien foreclosure	2-09-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
<i>State Farm Fire & Casualty v. T.B.</i>	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to \$300,000 plus postjudgment interest on entire amount of judgment until payment of its limits.	2-09-01	
<i>Merritt v. Evansville Vanderburgh School Corp</i>	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-09-01	
<i>IDEM v. RLG, Inc</i>	735 N.E.2d 290 27A02-9909-CV-646	the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title.	2-09-01	
<i>State v. Gerschoffer</i>	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	
<i>Healthscript, Inc. v. State</i>	724 N.E.2d 265, <i>rhrg.</i> 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	
<i>Vadas v. Vadas</i>	728 N.E.2d 250 45A04-9901-CV-18	Husband=s father, whom wife sought to join, was never served (wife gave husband=s attorney motion to join father) but is held to have submitted to divorce court=s jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-01-01	
<i>N.D.F. v. State</i>	740 N.E.2d 574 49A02-0006-CR-383	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two Aprior unrelated delinquency adjudications@; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-02-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
<i>Smith v. State</i>	734 N.E.2d 706 49A02-0005-CR-300	Retaining defendant=s DNA profile from a prior unrelated case and using it in new case no violation of state or federal Constitutions or of DNA database statute.	3-27-01	3-27-01. 744 N.E.2d 437. Retaining defendant=s DNA profile from a prior unrelated case and using it in new case no violation of state or federal Constitutions. Retention not authorized by database statute, but lack of authorization not a basis for invoking exclusionary rule.
<i>Robertson v. State</i>	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant=s apartment was part of his Adwelling@ for purposes of handgun license statute.	3-09-01	
<i>Bradley v. City of New Castle</i>	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-06-01	
<i>King v. Northeast Security</i>	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-06-01	
<i>State v. Hammond</i>	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require Avalidly@ suspended license is properly applied to offense committed prior to amendment, which made Aameliorative@ change to substantive crime intended to avoid supreme court=s construction of statute as in effect of time of offense.	4-06-01	
<i>Terrell v. State</i>	745 N.E.2d 219 82A049912-CR-537	Motion to set aside verdict filed after trial but prior to sentencing, based on newly discovered evidence, did not preserve issue for appeal, as motion to correct error was required.	4-11-01	745 N.E.2d 219. When evidence is discovered while case is still before trial court, either a pre-judgment motion to the court, as used here, or a post-judgment motion to correct error preserves issue for appeal.
<i>Wilson v. State</i>	727 N.E.2d 725	Patdown search justified prior to officer=s placing motorist in police car to perform nystagmus screen test.	4-16-01	55D01-9901-CM-013. Putting driver in squad car so as to be able to make patdown search, when patdown would not otherwise be justified, violates 4 th Amendment.

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
<i>McCann v. State</i>	742 N.E.2d 998 49A05-0002-CR-43	Photo array not improper; no prosecutorial misconduct; no error in attempted rape instruction; no error in sentencing refusal to rely on pregnancy of victim as not shown defendant knew of pregnancy.	4-12-01	
<i>Dewitt v. State</i>	739 N.E.2d 189	Trial court's failure to advise a defendant of his <i>Boykin</i> rights (trial by jury, confrontation, and privilege against self-incrimination) requires vacation of his guilty plea	4-26-01	
<i>Pennycuff v. State</i>	727 N.E.2d 723 49A02-9902-CR-117	Ineffective assistance for counsel to fail to object to State's references to defendant's silences in response to police questions about entries on his calendar, when references violated <i>Doyle v. Ohio</i>		49S02-0104-CR-213. no <i>Doyle</i> violation to put in evidence of defendant's silences about calendar questions after defendant had presented evidence he cooperated fully with authorities, including answering calendar questions
<i>Buchanan v. State</i>	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).		
<i>McCary v. State</i>	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under <i>Woods v. State</i> holding handed down after direct appeal..	5-10-01	
<i>Equicor Development, Inc. v. Westfield-Washington Township Plan Comm.</i>	732 N.E.2d 215 No. 29A02-9909-CV-661	Plan Commission denial of subdivision approval was arbitrary and capricious, notwithstanding it was supported by evidence, due to Commission's prior approvals of numerous subdivision having same defect.	5-10-01	